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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO. 1177

JOSEPH E. BASS, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM MORRIS, DECEASED,
Petitioners,

v.

TEXAS POWER & LIGHT COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND APPENDIX OF OPINIONS

W. JAMES KRONZER
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002
Counsel for Petitioners

Alpha Law Brief Co., H & H Bldg., Houston, Texas 77002

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IN THE

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OCTOBER TERM, 1970

NO. _____

JOSEPH E. BASS, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM MORRIS, DECEASED,
Petitioners,

v.

TEXAS POWER & LIGHT COMPANY, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on August 19, 1970, and modified by said Court on rehearing on September 30, 1970.

OPINIONS BELOW

The opinions of the courts below directly preceding this are as follows:

1. Order of Honorable Wayne Justice, District Judge, dated November 5, 1969 [unpublished] (Appendix A);
2. Opinion of Court of Appeals of August 19, 1970 [as yet unpublished] (Appendix B);
3. Opinion on Rehearing of September 30, 1970 [as yet unpublished] (Appendix C).

JURISDICTION

The judgment of the Court of Appeals was entered on August 25, 1970. The Opinion on Rehearing was delivered and filed on September 30, 1970. The jurisdiction of the Court is invoked under 28 U.S.C. Section 1254 (1).

QUESTIONS PRESENTED

Whether the appointment of an out-of-state administrator for the primary purpose of creating diversity of citizenship constitutes an "improper" or "collusive" device under Section 1359, Title 28, United States Code.

STATEMENT

This wrongful death action was commenced in the Eastern District of Texas on July 21, 1969, under the Texas Wrongful Death Statute, Article 4671, *et seq.*, Revised Civil Statutes of Texas. The decedent, John William Morris, was a resident of Texas and met his death in Texas on January 29, 1969. His estate is being administered by the County Court of Hardin County, Texas.

Petitioner, Joseph E. Ross, is and has at all material times been a resident citizen of the State of Louisiana. He was duly appointed and qualified as the administrator of the estate. He has and continues to administer the affairs of the estate from his residence.

The Defendant, Texas Power & Light Company, is incorporated under the laws of Texas and has its principal place of business in Dallas.

The statutory beneficiaries enumerated in Article 4675 of the Texas Wrongful Death Statute, for whose benefit this action is being prosecuted, are citizens of Texas. No attack has been heretofore made upon the validity of the appointment or the qualifications of Petitioner Bass to serve in that capacity. Under Texas law Bass is charged with the general administration of the affairs of the estate, and the bill of complaint alleges the possibility of a recovery for "conscious pain and suffering" which, under Texas law, belongs to the estate of the decedent. It is a separate and distinct cause of action from the "wrongful death" cause. *Mitchell vs. Akers*, 401 S.W. 2d 907 (Dallas Civ. App., 1966 writ refused n.r.e.). Thus, while it is conceded that the primary motivation for the appointment was creation of Federal diversity jurisdiction, it is not correct to say, as did Respondent in the court below, that the appointment was "hollow" or vacuous.

Based upon adequate authority, the District Court overruled and denied Respondent's Motion to Dismiss the cause under Title 28, U.S.C.A. Section 1359, but did certify the question to the Court of Appeals pursuant to Title 28, U.S.C.A. Section 1292(b).

REASONS FOR GRANTING THE WRIT

I.

The Court of Appeals erred in interpreting Section 1359, Title 28, United States Code, as requiring the dismissal of the cause.

Prior to 1948, with a single exception, all circuits uniformly held that the motive for the creation of a foreign

representative of an estate was immaterial in testing diversity jurisdiction. These cases were bottomed upon the holdings of the Court in *Mecom, Administrator vs. Simmons Drilling Co., Inc.*, 284 U.S. 183, 189, 52 S.Ct. 84, 76 L.Ed. 233 (1931) and *Mexican Central Ry Co vs. Eckman*, 187 U.S. 429, 23 S.Ct. 211, 47 L.Ed. 2d 245 (1903). Illustrative of that type of holding (and they were numerous) is *Harrison vs. Love*, 81 F.2d 115, 117 (6 Cir. 1936). In that case, as here, the real party in interest actually resided in the same jurisdiction as the defendant, but a foreign special administrator was appointed. In holding the motive for the appointment to be immaterial, the Sixth Circuit stated:

> "* * * As to the question of *collusion* the District Court rightly overruled the motion. Appellee was regularly appointed administrator of the estate in Michigan. The motive that actuated these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship."
> (Citing cases — Emphasis supplied)

The Court of Appeals in the present case indicates that "The precise issue presented here has never been decided by this Circuit". (Appendix B-3) The Court of Appeals did say, however, that

> "* * * Until recently, we would have been constrained to uphold jurisdiction in this situation under the leading Third Circuit decision of *Corabi v. Auto Racing, Inc.*, 1959, 264 F.2d 784, 75 A.L.R. 2d 711 (*en banc*)."

In *Mecom* and *Eckman* the Court reasoned that the motive for creating a representative of an estate was immaterial when done to defeat Federal jurisdiction. This court said in *Mecom*:

> "But it is clear that the *motive or purpose that actuated any or all of these parties in procuring a lawful and valid appointment is immaterial upon the question of identity or diversity of citizenship.* To go behind the decree of the probate court would be collaterally to attack it, not for lack of jurisdiction of the subject matter or absence of jurisdictional facts, but to inquire into purposes and motives of the parties before that Court, when, confessedly, they practiced no fraud upon it." (Emphasis supplied)

In 1948 present Section 1359 was enacted. It consolidated various provisions of the pre-existing code, and, in particular, Section 37 of the Judicial Code of 1911, which stemmed from Section 11, 1 Stat. 79 (1789). There is nothing in the congressional history indicating a legislative intent to change the pre-existing rule applicable to the prior statutes. This was made clear by the Fifth Circuit in *Carribean Mills, Inc. v. Kramer*, 392 F.2d 387, 389 (1968), when it concluded:

> "* * * In the 1948 Judicial Code, the Reviser condensed these two sections into Section 1359, the statute we have today. The Reviser's Notes indicate that the purpose of condensing the two sections into one was twofold: To eliminate confusing and unnecessary exceptions to the assignee clause and to eliminate the effect of that clause on bona fide assignees. Under the original clause, a bona fide assignee could not sue in federal court unless his assignor could have; under Section 1359, any assignee can sue in federal court so long as he was not improperly or collusively made a party in order to invoke federal jurisdiction. The Reviser's Notes *do not suggest any other change in law or policy.*" (Emphasis added)

Again, with specific reference to the *Corabi* decision, the Fifth Circuit further stated:

> "* * * The Reviser's Notes indicate that Section 1359 was designed to eliminate some of the defects of the assignee clause, but they do not reflect any change of policy with respect to the Act of 1875 and its successor statutes. While it might be argued that the revised section places greater emphasis on the fact that its application is limited to improper or collusive arrangements, the Reviser's Notes do not suggest a legislative intent to narrow the effect of court decisions previously discussed. * * *" 392 F.2d at Page 391. (Emphasis added)

This Honorable Court granted a writ of certiorari in the *Kramer* case, but, as it did not involve the question of the validity of creating federal jurisdiction by the appointment of a foreign representative, the Court noted in footnote 9 (394 U.S. 827, 89 S.Ct. 1487, 1490) that:

> "Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative "improper" or "collusive". See, e.g., McSparran v. Weist, 402 F.2d 867 (3 Cir. 1968); Lang v. Elm City Constr. Co., 324 F.2d 235 (2 Cir. 1963); County of Todd v. Loegering, 297 F.2d 470 (8 Cir. 1961; cf. Mecom v. Fitzsimmons Drilling Co., 284 U.S. 183, 52 S.Ct. 84, 76 L.Ed. 233 (1931). Cases involving representatives vary in several respects from those in which jurisdiction is based on assignments: (1) in the former situation, some representative must be appointed before suit can be brought, while in the latter the assignor normally is himself capable of suing in state court; (2) under state law, different kinds of guardians and administrators may possess discrete sorts of powers; and (3) all such representatives owe their appointment to the decree of a state court, rather than solely to an action of the parties. It is not necessary to

decide whether these distinctions amount to a difference for purposes of §1359."

It was in this context of things that the Third Circuit, in *McSparran v. Weist*, 402 F.2d 867 (3 Cir. 1968) overruled its earlier decision in the *Corabi* case. The Third Circuit injected new meaning into Section 1359 without the benefit of any appropriate congressional manifestations, and thus left that Circuit with the right to defeat federal jurisdiction by the appointment of a representative, but not the right to create federal jurisdiction.

Incidentally, undersigned counsel, not the Respondents, directed the attention of the Fifth Circuit to what were then the unpublished decisions of the Fourth and Second Circuits in *Lester v. McFaddon*, 415 F.2d 1101 (1969) and *O'Brien v. Avco Corp.*, ____F.2d____, (2 Cir. 1969), both following the *McSparran* decision. Recently, in *Novak v. Mount Marty Hospital Association*, 315 F. Sup. 931, 933 (S. Dak., Sept. 3, 1970) the United States District Court for the Southern District of South Dakota refused to follow this "expanded interpretation of 28 U.S.C. §1359", but felt "bound to follow the rule of this circuit (Eighth)".

It occurs to us that the time is nigh for this Honorable Court to resolve the dispute in the various circuits, as portended in the *Kramer* decision. The effect of the interpretation accorded Section 1359 by the Court of Appeals is to

(1) write new meaning into the pre-existing statutory structure,

(2) develop a rule for the Fifth Circuit that authorizes the appointment of representatives to destroy jurisdiction but not to create it, and

(3) require an inquiry into each case as to the purposes for the creation of the administrator or representative.

Rather than expedite federal jurisdiction, a further and new jurisdictional incursion into the reasons for and the validity of state court appointments of representatives of estates seems unwarranted.

II.

Any such drastic change in diversity jurisdiction should come from this Court or the Congress.

It is quite true that for years various exponents of limiting federal jurisdiction have criticized the rule of the *Mecom* and *Eckman* cases, as well as the corollary principle now struck down by the Court of Appeals for the Fifth Circuit. It has never been suggested, however, that the change should come from judicial action, particularly since it is apparent that the Congress did not intend to ascribe a new or "expanded meaning" to Section 1359 when it consolidated and clarified the various prior statutes in 1948.

Moreover, there are countervailing arguments that favor the retention of this device, at least when it has to do with the creation of federal jurisdiction. While a dispute may be considered to be largely if not entirely "local in nature", this consideration alone should not necessarily destroy the administration of appropriate justice in the federal system. While comity between the state and federal systems is often desired, there are as many reasons for the existence of federal jurisdiction in certain locales as there are reasons for true diversity situation, and this cannot be gainsaid. It is not simply forum shopping, but

the previously permitted device has been effectively utilized to achieve a higher degree of impartial justice due to improved discovery techniques in the federal system and the broader base of jury selection arising under the Jury Selection Act of 1968.

In any event, in the past the courts have not seen fit to destroy diversity jurisdiction without congressional intervention. The corporate fiction problems could as easily have been dealt with by the judicial process as the one that has now been stricken by the Fifth Circuit, but this Court consistently abstained in the corporate diversity area until the Congress acted accordingly in 1948. Nor may individual domiciliary jurisdiction be denied merely because the primary motivation in the establishment of the new residence was to defeat or create federal jurisdiction.

CONCLUSION AND PRAYER

At the time this proceeding was filed counsel for Petitioners had every reason to believe that original diversity jurisdiction existed under the holdings of the Fifth Circuit, as well as the vast majority of all the other circuits save the Third. Section 1359 had been carefully interpreted as not providing for expanded jurisdiction in this area in the *Kramer* case, and this Honorable Court certainly left the matter open, but with continued overtones against the invasion of the state power to administer estates and appoint appropriate representatives.

The Fifth Circuit, as well as the other circuits that have now fallen in line, have plainly engaged in judicial legislation, and there is no saving grace in the pronouncements that no real harm has been done the Petitioners simply because a new suit may be filed in the state court within the limitational period.

The most specious argument of all is that which suggests there is no inconsistency between the *Afecom*-type case in which federal jurisdiction is destroyed and the type of case at bar in which federal jurisdiction is created. The source of this distinction is allegedly found in the 1948 Amendment to Section 1359. But that was not the congressional intention, nor may it be read into any portion of the new statute.

It is an unanswerable truism that the Court of Appeals has visited its own concept of restricting federal diversity jurisdiction without the benefit of congressional action. This Court should correct the error, or, at the very least, announce a uniform rule applicable to all the circuits.

WHEREFORE, Petitioners pray the opinion and judgment of the Court of Appeals be reversed and the order of the District Court be reinstated, and for such other relief as appears appropriate.

Respectfully submitted,

W. JAMES KRONZER
500 Houston First Savings Bldg.
711 Fannin Street
Houston, TEXAS 77002
Counsel for Petitioners

CERTIFICATE

The undersigned certifies that on the 24th day of December, A.D., 1970, he did mail, by first class United States mail, three copies of the foregoing Petition and Appendix of Opinions to Wayne Person, Esq., Counsel for Respondent, and that said counsel will be immediately notified of the date of docketing with the Clerk of Court.

W. JAMES KRONZER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

NO._____

JOSEPH E. BASS, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM MORRIS, DECEASED,
Petitioners,

v.

TEXAS POWER & LIGHT COMPANY, *Respondent*

APPENDIX OF OPINIONS

W. JAMES KRONZER
500 Houston First Savings Bldg.
711 Fannin Street
Houston, Texas 77002
Counsel for Petitioners

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APPENDIX A

IN THE

United States District Court

FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

JOSEPH E. BASS, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM MORRIS, DECEASED

v.

TEXAS POWER & LIGHT COMPANY

CIVIL ACTION NO. 6368

AMENDED ORDER

This day came on to be heard defendant's motion to amend the Order of this Court of October 8, 1969, which Order denied defendant's Motion to Dismiss for Want of Jurisdiction, so as to authorize by such amendment an immediate appeal from such Order pursuant to 28 U.S. C.A,. Section 1292(b); and the Court, after considering such motion to amend and the brief of authorities filed in support thereof, is of the opinion that such motion should be granted;

It is, therefore, ORDERED that said Order of October 8, 1969 be, and the same is hereby, amended and, as amended, shall read as follows:

ORDER

This day came on to be considered the defendant's Motion to Dismiss the above-styled and numbered cause. The defendant urges this Court to follow the holding in *McSparran v. Weist*, 402 F.2d 867 (3rd Cir. 1968), to the effect that a federal district court has no jurisdiction where one of the parties is a non-resident fiduciary appointed for the sole purpose of creating diversity jurisdiction. However, this Court is bound by the latest pronouncement on this issue by the Court of Appeals for the Fifth Circuit. *Jackson v. Trans World Marine Corp.*, 296 F.Supp. 1396 (S.D. Ga. 1969). In *Nunn v. Feltinton*, 294 F.2d 450 (5th Cir. 1961), it was held that representatives stand on their own citizenship in federal court irrespective of the citizenship of the persons they represent. See *Pontarelli Trust v. City of McAllen*, 288 F. Supp. 988 (S.D. Tex. 1968). Accordingly, it is

ORDERED that the defendant's Motion to Dismiss be, and it is hereby, denied.

The Court is of the opinion that this Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from said Order may materially advance the ultimate termination of the litigation.

Amended Order SIGNED AND ENTERED this 5th day of November, 1969.

WM. WAYNE JUSTICE
United States District Judge

(Seal)

APPENDIX B

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28955

JOSEPH E. BASS, Administrator of the Estate of JOHN WILLIAM MORRIS, Deceased, *Plaintiff-Appellee*,

versus

TEXAS POWER & LIGHT COMPANY, *Defendant-Appellant*.

Appeal from the United States District Court for the Eastern District of Texas

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(August 19, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges.

MORGAN, Circuit Judge: This appeal presents the issue of whether the appointment of an out-of-state administrator for the sole purpose of creating diversity of citizenship between the parties of a lawsuit in order to invoke the jurisdiction of the federal courts is "improper" or "collusive" under Section 1359, Title 28, United States

Code.[1] The District Court held for jurisdiction. We reverse.

This wrongful death action was commenced in the Eastern District of Texas on July 21, 1969, under the Texas Wrongful Death Statute, Article 4671, *et seq.*, Revised Civil Statutes of Texas. The decedent, John William Morris, was a resident of Texas and met his death in Texas on January 29, 1969. His estate is being administered by the County Court of Hardin County, Texas. The defendant Texas Power & Light Company is incorporated under the laws of Texas and has its principal place of business in Dallas. The statutory beneficiaries under Article 4671, *et seq.*, supra, for whose benefit this action is being prosecuted, are all citizens of Texas. The administrator of Morris' estate and the named plaintiff in this action is Joseph E. Bass, who is, and at all times pertinent has been, a citizen of the State of Louisiana. It is candidly admitted by the plaintiff-appellee that Bass was appointed administrator of Morris' estate for the sole purpose of manufacturing or artificially creating diversity of citizenship so that the attorneys of Morris' statutory beneficiaries could invoke the jurisdiction of the District Court. Defendant-appellant's motion to dismiss for want of jurisdiction was denied, but the matter was certified to this court pursuant to 28 U.S.C. §1292(b). We granted defendant-appellant leave to appeal from the District Court's interlocutory order on November 5, 1969.

The precise issue presented here has never been decided by this circuit. Until recently, we would have been con-

1. Section 1359 provides:
   A district court shall not have jurisdiction of a civil action in which a party, by assignment, or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court.

strained to uphold jurisdiction in this situation under the leading Third Circuit decision of *Corabi v. Auto Racing, Inc.*, 1959, 264 F.2d 784, 75 A.L.R.2d 711 (*en banc*), which narrowly construed the meaning of the words "improper" and "collusive" as used in Section 1359, and refused any inquiry into the purpose behind the appointment of an out-of-state administrator. See also *Jaffe v. Philadelphia & Western R. Co.*, 3 Cir., 1950, 180 F.2d 1010. However, the rule in *Corabi* is now dead. In *Caribbean Mills, Inc. v. Kramer*, 5 Cir., 1968, 392 F.2d 387, aff'd. (opinion) 394 U.S. 823, 89 S.Ct. 1487, 23 L.Ed.2d 9, this circuit rejected the narrow construction of Section 1359 which formed the basis of the Third Circuit's position in *Corabi* and held that an assignee for collection purposes cannot properly invoke federal diversity jurisdiction without divesting the assignor of his interest in the lawsuit. In doing so, the Court, speaking through Judge Thornberry, said:

> In the context of Section 1359 and its predecessor statutes, the phrase "improperly or collusively" means what the courts have said it means. Hence, an attempt to create federal jurisdiction by colorable assignment or *other device without substance* is "improper or collusive" within the meaning of the statute. (Emphasis added.) At 393.

In affirming, the Supreme Court, in a footnote, specifically reserved the question presented here.[2] In the meantime, however, the Third Circuit, again sitting *en banc*, ex-

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2. The footnote reads in part:

> Nor is it necessary to consider whether, in cases in which suit is required to be brought by an administrator or guardian, a motive to create diversity jurisdiction renders the appointment of an out-of-state representative "improper" or "collusive". 394 U.S. at 828, n. 9.

pressly overruled *Corabi*, supra, and *Jaffe*, supra, in *McSparran v. Weist*, 3 Cir., 1968, 402 F.2d 867, cert. den. 395 U.S. 903.

After construing Section 1359 in light of its predecessors[3] and the interpretation given them by the courts,[4] the Court in *McSparran* held that the appointment of an out-of-state guardian solely for the purpose of creating diversity jurisdiction was "improper" and "collusive" within the meaning of Section 1359. The Court stressed the lack of substance in the appointment, saying:

> . . . The collusion exists between the nonresident guardian and the applicant for his appointment in the state proceeding as a result of which one who would not otherwise have been named guardian has achieved the status from which he claims the right to sue because of his artificial selection solely for the purpose of creating jurisdiction. He is not chosen because of his capacity to manage the property of his ward, and indeed need have no experience in the management of property. He is outside the jurisdiction of the court which is to supervise his nominal activity. In truth none of the considerations which normally lead to the selection of a guardian affects the local appointing court's determination because it knows that in the "manufactured" diversity case the guardian is not expected to manage any property for his supposed ward and usually will not

3. Section 1359, originating in the 1948 revision of Title 28, U.S.C., is a combination of the old anti-assignment statute, 28 U.S.C. §41(1) (1940 ed.) derived from §11 of the Judiciary Act of 1789, Act of Sept. 24, 1789, ch. 20, §11, 1 Stat. 73 and the Act of Mar. 3, 1875, ch. 137, §5, 18 Stat. 470, incorporated as §37 of the Judicial Code of 1911, 28 U.S.C. §80 (1940 ed.)

4. See the court's discussion and cases cited therein, *Ferrara v. Philadelphia Laboratories, Inc.*, D. Vt., 1967, 272 F. Supp. 1000, aff'd. 2 Cir., 1968, 393 F.2d 934.

> continue in office or exercise any real function after any funds are recovered in the litigation. He is no more than a representative of the minor's counsel whom counsel provides in order to establish a diversity of citizenship which will permit him to bring the action in the federal court. As a straw party he does not stand in the position of a true fiduciary whose involvement in litigation is incidental to his general duty to protect the interests of those for whom he is responsible. At 873.

In discussing the necessity to inquire into the motive behind the appointment, the Court said:

> It has often been said that in judging whether diversity of citizenship exists the courts will not inquire into the motive which lead to the appointment of the personal representative. (Footnote omitted) While, of course, the desire to obtain diversity jurisdiction is not in itself improper, nevertheless it is not irrelevant in the determination of the question whether the fiduciary is in fact a straw fiduciary whose citizenship is to be disregarded. (Footnote omitted) Moreover, it is difficult to see how motive can be entirely ignored in ascertaining the purpose for which the representative is selected in view of the language of Section 1359. The statute outlaws the creation of jurisdiction where a party has been improperly or collusively made or joined to invoke the jurisdiction of the court. While the statute does not ban the appointment of nonresident fiduciaries, the artificial selection of a straw representative who has no duty or function except to offer the use of his citizenship to create diversity in contemplated litigation is a violation of its provisions. . .

Following *McSparran*, the Fourth Circuit has held in *Lester v. McFaddon*, 4 Cir., 1969, 415 F.2d 1101, that

"the appointment [of an out-of-state administrator] for the purposes of creating apparent diversity of citizenship [is] an improper manufacture of jurisdiction within the meaning of §1359". At 1104. In doing so, the Court said:

> If he [the administrator] has no stake in the outcome, if he is a real party in interest only in the narrow procedural sense of those words and his appointment was secured solely for the purpose of creating diversity of citizenship, the apparent diversity is pretension. The pretensive making of a party is improper within the meaning of §1359. At 1106.

And noted

> It is a lack of a stake in the outcome coupled with the motive to bring into a federal court a local action nominally triable only in a state court which is the common thread of the cases holding actions collusively or improperly brought. (Citing cases.) At 1006, n. 11.

Likewise, the Second Circuit, in *O'Brien v. AVCO Corp.*, 2 Cir., 1969, ____ F.2d ____ [Nos. 33576-77, Nov. 13, 1969], held that the appointment of an out-of-state administrator for the purpose of obtaining federal jurisdiction violates Section 1359, relying principally on the Supreme Court decision in *Kramer v. Caribbean Mills, Inc.*, supra.

These cases make it clear that the District Court must be reversed in this case since it is admitted by the plaintiff-appellee that Bass' appointment, while proper in *form*, was totally lacking in *substance*, and done for the sole purpose of creating diversity of citizenship to invoke the jurisdiction of the District Court.

We do not express any opinion as to the ambiguous situations potentially involving manufactured jurisdiction that may present themselves to the district courts of this circuit in the future. The question of whether a device is so lacking in substance as to be improper and collusive under Section 1359 is a question of fact. *McSparran v. Weist, supra,* 402 F.2d at 876. Admittedly, any inquiry into the presence of a motive to create jurisdiction is fraught with difficulty.[5] The mechanically efficient rule of *Corabi* is gone, the equally efficient rule of the American Law Institute[6] yet remains only a proposal, and the courts are left to work the matter out under *Caribbean Mills, Inc. v. Kramer,* supra; *McSparran,* supra; and the other cases relied on here.

The judgment of the District Court is hereby

REVERSED.

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5. See *Esposito v. Emery,* 3 Cir., 1968, 402 F.2d 878, 880 (Biggs, J. dissenting in part and concurring in part); C. Wright, *Law of Federal Courts,* §31, p. 102 (2nd ed., 1970); Note, "Manufactured Federal Diversity Jurisdiction and Section 1359", 69 *Colum. L. Rev.* 706 (1969).

6. The statute proposed by the ALI would test diversity by the citizenship of the decedent or the beneficiary instead of the citizenship of the fiduciary. American Law Institute, Study of the Division of Jurisdiction Between State and Federal Courts, Part I, Proposed §1301(b)(4) (Official draft, 1965).

APPENDIX C

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 28955

JOSEPH E. BASS, Administrator of the Estate of JOHN WILLIAM MORRIS, Deceased, *Plaintiff-Appellee*,

versus

TEXAS POWER & LIGHT COMPANY,
Defendant-Appellant.

Appeal from the United States District Court for the Eastern District of Texas

---

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion August 19, 1970, 5 Cir., 1970, ____ F.2d ____)

(September 30, 1970)

Before GODBOLD, SIMPSON and MORGAN, Circuit Judges

PER CURIAM: The Petition for Rehearing is DENIED and no member of this panel nor Judge in reg-

ular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

However, in order to clarify our opinion of August 19, 1970, the following footnote will be added at the end of the next to the last paragraph of the opinion, following the language "and the other cases relied on here":

> 'The limitation period for a death action under Texas law is two years. Texas Revised Civil Statutes, Article 5526(7). Since Morris' death occurred on January 29, 1969, the instant cause of action will not be barred by limitation until January 29, 1971, and, consequently, there is ample time for the plaintiff to bring suit in state court. However, it would be inequitable to apply this decision to all presently pending diversity cases involving the possible manufacture of jurisdiction by the appointment of non-resident personal representatives if the institution of a new suit in state court would be barred by the applicable statute of limitation. We therefore adopt the approach of the Third Circuit limiting the retroactive application of this decision to situations where "(1) the plaintiff has 'ample time and opportunity' to bring an action in the state court, and (2) dismissal would not impose an 'unreasonable burden' on either party or on the administration of justice". *Groh v. Brooks*, 3 Cir., 1970, 421 F.2d 589, 593. See *McSparran v. Weist*, supra, 402 F.2d at 876-77; *Esposito v. Every*, 3 Cir., 1968, 402 F.2d 878.

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SUPREME COURT, U. S.

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FILED
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In the

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1177

JOSEPH E. BASS, ADMINISTRATOR OF THE ESTATE OF JOHN WILLIAM MORRIS, DECEASED,
Petitioner,

v.

TEXAS POWER & LIGHT COMPANY,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LOGAN FORD,
1511 Fidelity Union Life Bldg.,
Dallas, Texas 75201,
Counsel for Respondent.

THE WARLICK PRESS DIVISION, STECK-WARLICK CO.
P. O. BOX 10948 — 1459 ROUND TABLE DRIVE — DALLAS — 631-3130

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondent prays this Honorable Court to deny the petition for a writ of certiorari for the reason that no special or important reason exists for a review by this Court of the correct and just decision of the United States Court of Appeals for the Fifth Circuit.

STATUTE INVOLVED

As Petitioner failed to set forth the statute herein involved, Respondent will do so. This case involves the construction of 28 U.S.C. Section 1359, reading verbatim as follows:

> "A district court shall not have jurisdiction of a civil action in which a party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court. June 25, 1948, c. 646, 62 Stat. 935."

STATEMENT OF THE CASE

Petitioner has not accurately stated the material facts of this case. These facts are: (1.) All of the real parties in interest whom Petitioner represents — all of the statutory beneficiaries under the Texas Wrongful Death Act (Article 4671, *et seq.*, Revised Civil Statutes of Texas) *and* all of the decedent's heirs at law under the Texas Statute of Descent and Distribution (Texas Probate Code, Section 45, Revised Civil Statutes of Texas) who would be entitled to participate in any "possible" recovery under the Texas Survival Statute (Article 5525, Revised Civil Statutes of Texas)[1] — are residents and citizens of the State of Texas; (2.) The decedent

[1] While such is not considered to be of controlling importance, it is most doubtful that Petitioner's Bill of Complaint filed in the District Court is sufficient to allege a cause of action for "conscious pain and suffering" under the Survival Statute. No damages are alleged to result from such; all of the damages alleged are prayed to be apportioned to the statutory beneficiaries under the Texas Wrongful Death Act. Doubtful and speculative pleadings are insufficient. *Brown v. Keene*, 8 Pet. 112, 115, 8 L. Ed. 885, 886 (1834); *Twachtman v. Connelly*, 106 F. 2d 501, 505 (6 Cir. 1939); and *Molnar v. National Broadcasting Company*, 231 F. 2d 684, 687 (9 Cir. 1956).

was a resident and citizen of the State of Texas; (3.) Respondent is a citizen of the State of Texas, being a corporation organized and existing under the laws of the State of Texas and having its principal office and place of business in the State of Texas; (4.) The incident made the basis of Petitioner's suit occurred within the State of Texas; (5.) Joseph E. Bass, a citizen of the State of Louisiana, is an Attorney at Law who was chosen as the Administrator of the instant estate for the purpose of artificially creating diversity of citizenship; and (6.) Counsel for Petitioner has repeatedly admitted in both courts below that a foreign administrator was appointed for the purpose of invoking the jurisdiction of the United States District Court and that no issue would be made concerning any other reasons for such appointment.

Petitioner, of course, offered no evidence of any other reason for the appointment of the foreign administrator. Nor is there any evidence of Mr. Bass performing any duties or acts of administering the affairs of the estate as Petitioner would intimate in his Petition.

The Court of Appeals held the appointment of the foreign administrator for the admitted purpose of manufacturing diversity of citizenship did not give the District Court jurisdiction under 28 U.S.C. Section 1359. The Court of Appeals denied a petition for rehearing en banc as no Judge in active service requested such an en banc hearing.

REASONS FOR DENYING A WRIT

I.

The Court of Appeals correctly interpreted Section 1359, Title 28, United States Code, as requiring the dismissal of the cause.

Prior to the decision in *McSparran v. Weist*, 402 F. 2d 867 (3 Cir. 1968) cert. den. sub. nom. *Fritzinger v. Weist*, 395 U.S. 903, 89 S. Ct. 1739, 23 L. Ed. 2d 217 (1969), with one exception, the various circuits wherein the question was presented held that the motive for the appointment of a foreign representative of an estate was immaterial on the question of Federal diversity jurisdiction. The leading case on this subject was *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (3 Cir. 1959). The third Circuit in *McSparran* made an exhaustive study of the authorities and concluded that although *Corabi* had become the leading case on the point and "the authoritative foundation for the maintenance of 'manufactured' diversity jurisdiction", *Corabi* was ill-decided and brought the Federal judicial system into "disrepute". The Court recognized that *Corabi* unduly limited the meaning and scope of Section 1359, and determined to give the Statute the construction and meaning intended by the Congress. *Corabi* was specifically overruled by the very Court that decided it.

Since the *McSparran* decision, all of the Courts of Appeals wherein the question has been presented have ruled that the appointment of a foreign representative of an estate for the purpose of manufacturing diversity jurisdiction runs afoul Section 1359. The Fourth Circuit followed *McSparran* in *Lester v. McFaddon*, 415 F. 2d 1101 (4 Cir. 1969). The

Second Circuit followed in *O'Brien v. Avco Corp.*, 425 F. 2d 1030 (2 Cir. 1969). It is likewise clear that the Eighth Circuit will also look to the motives behind an appointment of a representative to determine the applicability of Section 1359. *Rogers v. Bates*, 431 F. 2d 16 (8 Cir. 1970). The Fifth Circuit has done nothing more in the case at bar. No case decided by a Court of Appeals subsequent to *McSparran* has failed to adopt the rule of that case.

The Courts of Appeals have adopted the *McSparran* rule because of the soundness of that opinion. The Court in *McSparran* did not question or attempt to change the well-settled rule that the citizenship of the administrator rather than the citizenship of the deceased or his beneficiaries is *generally* controlling in the determination of diversity. The Court did hold that manufactured diversity violates 28 U.S.C. Section 1359. In reaching this sound decision, the Court traced the nature and purpose of diversity jurisdiction. The Court looked to the legislative history to determine the true meaning of the terms "improperly" and "collusively" as used in Section 1359 and concluded that these words could only mean that a "nominal party designated simply for the purpose of creating diversity of citizenship, who has no real or substantial interest, is improperly or collusively named" (402 F. 2d, pages 872-873). In such a case, the Court noted, the nominal party is not chosen because of his capacity to manage the property of his beneficiary. Further, he is outside the jurisdiction of the Court which is to supervise his nominal activity. In truth, the nominal party is not expected to exercise any real function or duty

but is appointed solely so that his citizenship can be used to create diversity. The Court noted that in such cases the nominal party is no more than a representative of counsel, selected by counsel so as to enable counsel to bring the action in the United States District Court (402 F. 2d, page 873). Such a case violates both the letter and spirit of Section 1359. Such a case is the admitted case at bar.

Manufactured diversity as sanctioned by the pre-*McSparran* cases violates even more fundamental principles of federalism. The Court in *McSparran* cited *City of Indianapolis v. Chase National Bank*, 314 U.S. 63, 76-77, 62 S. Ct. 15, 86 L. Ed. 47, 54 (1941). We quote from the opinion of the Supreme Court in the *City of Indianapolis* case, as written by Mr. Justice Frankfurter:

> "The dominant note in the successive enactments of Congress relating to diversity jurisdiction is one of jealous restriction, of avoiding offense to state sensitiveness, and of relieving the federal courts of the overwhelming burden of 'business that intrinsically belongs to the state courts' in order to keep them free for their distinctive federal business. See Friendly, The Historic Basis of Diversity Jurisdiction, 41 Harvard L. Rev. 483, 510; Shamrock Oil & Gas Corp. v. Sheets, 313 U.S. 100, 108, 109, 85 L. Ed. 1214, 1219, 61 S. Ct. 868; Healy v. Ratta, 292 U.S. 263, 270, 78 L. Ed. 1248, 1253, 54 S. Ct. 700. 'The policy of the statute (conferring diversity jurisdiction upon the district courts) calls for its strict construction. The power reserved to the states, under the Constitution, to provide for the determination of controversies in their courts may be restricted only by the action of Congress in conformity to the judiciary sections of the Constitution * * * Due regard for the rightful independence of state governments, which

> should actuate federal courts, requires that they scrupulously confine their own jurisdiction to the precise limits which the statute has defined.' Healy v. Ratta, supra (292 U.S. at 270, 78 L. Ed. 1253, 54 S. Ct. 700). In defining the boundaries of diversity jurisdiction, this Court must be mindful of this guiding Congressional policy."

The case at bar is essentially local in nature. All of the real parties in interest are Texas citizens as was the decedent. The accident made the basis of Petitioner's suit occurred in Texas. As in *McSparran*, the underlying reason and purpose for diversity jurisdiction — the prevention of discrimination against out-of-state litigants — is wholly absent in this case.

Not only did the Court in *McSparran* determine that *Corabi* was wrong as viewed from a legal standpoint, but the Court also found it impossible to live with *Corabi* practically. The Court alluded to an American Law Institute study which showed that over one-fifth of the diversity cases pending in a particular United States District Court (the Eastern District of Pennsylvania) were brought by out-of-state personal representatives of in-state citizens against in-state citizens. This same study showed that one out-of-state citizen was the guardian in sixty-one diversity cases pending in that particular District Court. Counsel is not aware of the existence of a similar study with regard to the Eastern District of Texas or with regard to any other District within the Fifth Circuit; counsel, however, doubts that there is anything peculiarly unique or novel about the instant case. The annual report of the Administrative Office

of the United States Courts for the year ended June 30, 1969, which appears in Vol. 56, American Bar Journal, page 87 (Jan. 1970), does reflect that the increases in cases pending in the Courts of Appeals are unprecedented, with the Fifth Circuit having the largest percentage of increase. Increases in the number of cases pending in the District Courts are likewise unprecedented.

Petitioner makes the same error as the Third Circuit acknowledged it had made in *Corabi* when he asserts that the question presented herein is controlled by *Mecom v. Fitzsimmons Drilling Company*, 284 U.S. 183, 52 S. Ct. 84, 76 L. Ed. 233 (1931). *Mecom* does not deal with manufactured diversity. In *Mecom*, the attack was made upon the device of appointing an administrator of the plaintiff's estate who had the *same* citizenship as the defendant so as to DEFEAT Federal diversity jurisdiction. Section 1359 has absolutely nothing to do with assignments or other devices made to DEFEAT diversity jurisdiction but only deals with assignments and other devices made to INVOKE diversity jurisdiction. Consequently, Section 1359 is not cited or discussed in *Mecom*. The all-important distinguishing factor between *Mecom* and the case at bar is the act of Congress which denies jurisdiction to the United States District Court where one is made a party to a suit to INVOKE the jurisdiction of such Court. All of the Courts of Appeals that have been presented with this question since *McSparran* have held that an attempt to create Federal jurisdiction by some device without substance is improper or collusive within the meaning of that statute.

Mecom is inapposite to our case; our case is controlled by 28 U.S.C. Section 1359.

Petitioner argues that the Court of Appeals herein has been guilty of "judicial legislation". Giving effect to the intention of the Congress is not a usurpation of legislative authority but is the proper function, duty and responsibility of the Federal courts under the Constitution. The Fifth Circuit in *Caribbean Mills, Inc. v. Kramer*, 392 F. 2d 387 (5 Cir. 1968) affirmed at *Kramer v. Caribbean Mills, Inc.*, 394 U.S. 823, 89 S. Ct. 1487, 23 L. Ed. 2d 9 (1969) rightly characterized the holding in *Corabi* when it stated that "by focusing on the literal meanings of the two words (improperly and collusively), the Court virtually emasculated the statute". Petitioner herein would urge the same emasculation of that Congressional intent. If indeed there has been any "judicial legislation", it is found in those earlier cases which ignore the Congressional intent to preclude manufactured jurisdiction.

Petitioner's contention that the holding herein, is a collateral attack on the validity of the State Court appointment, is also without merit. As held by this Court in *Kramer:*

> "The existence of federal jurisdiction is a matter of Federal, not state, law."

The decision made by the Court of Appeals does not attack or impugn the validity of the appointment of the foreign administrator but only refuses to recognize the administrator's citizenship as being conclusively determinative of the

diversity jurisdiction of the United States District Court. Petitioner is still the administrator and is perfectly free to file his cause in the State Court which is peculiarly capable of handling such local matters. As held in *Kramer*, the validity under State law of the device chosen to manufacture jurisdiction is immaterial; that is not the question.

Article 4675 of the Revised Civil Statutes of Texas, a part of the Texas Wrongful Death Act, provides that the statutory beneficiaries themselves may bring the suit. The administrator is authorized to sue for their exclusive benefit ONLY if the beneficiaries fail to institute suit *and* if they do not request the administrator not to bring suit. Petitioner claims to have pleaded the "possibility" of a recovery for "conscious pain and suffering", which recovery would belong to the decedent's estate.[2] Surely, the jurisdiction of the District Court is not to attach by such a tenuous thread — a pleading of "possibility" which asks for no damages resulting from such "possibility". However, if this "possibility" could be transformed into a well-pled cause of action, still the fact remains that the foreign administrator is a "straw party" selected by counsel so as to enable counsel to bring the action in the United States District Court. Such an appointment for no purpose other than to manufacture diversity of citizenship cannot and does not vest the District Court with jurisdiction if Section 1359 be given the meaning intended by the Congress. Petitioner's "interest" in any re-

[2] Petitioner himself characterizes his pleading as asserting only a possibility of such a recovery. Page 3, Petition For a Writ of Certiorari.

covery for conscious pain and suffering — assuming such to be properly pled — can only be the statutory 5% commission "interest", an "interest" virtually identical to that held insufficient by this Court in *Kramer*. Such commission "interest" would only be a by-product of his selection and appointment. Just as in *Kramer*, the particular assignee (here, administrator) was selected and given this "interest" *only* because counsel desired to use his foreign citizenship in order to manufacture diversity so as to invoke the jurisdiction of the United States District Court.

The Second, Third, Fourth and Fifth Circuits have determined to give Section 1359 the meaning intended by the Congress. The Eighth Circuit has held that it will also look to the motives of an appointment of a foreign representative. Many District Courts have followed. The Court in *Dougherty v. Oberg*, (D.C. Minn. 1969) 297 F. Supp. 635, 636-637 felt compelled to follow the logic of *McSparran* rather than the earlier cases of the Eighth Circuit. *Gilchrist v. Strong* (W.D. Okla. 1969) 299 F. Supp. 804, 805-807 is also a well-reasoned opinion reflecting a careful study of the question and standing for the proper construction of Section 1359.

Indeed, most of the pre-*McSparran* opinions which contain any discussion further than the blind citation of the overruled *Corabi* case are clearly distinguishable from *McSparran* and similar cases. In these pre-*McSparran* cases, the foreign representative was selected for some justifiable reason of substance independent of the consideration of diversity. These foreign representatives were kin to the

decedent, a close personal friend of the decedent or bore some other close personal relationship to the decedent or his family. Such appointments are not improper under Section 1359 and are sufficient to confer Federal jurisdiction under *McSparran* and the other similar cases.

II.

The proper construction of 28 U.S.C. Section 1359 is a just matter for the Federal Courts.

Mr. Chief Justice Burger in his State of the Judiciary Address (Vol. 56, American Bar Journal, page 933, October, 1970) spoke to the problem of the proper functions of the Federal and State Courts:

> "As to the future I can do no more than emphasize that the Federal court system is for a limited purpose, and lawyers, the Congress and the public must examine carefully each demand they make on that system. People speak glibly of putting all the problems of pollution, of crowded cities, of consumer class actions and others in the Federal courts. Some of these problems are local, and we should look more to state courts familiar with local conditions."

The first major problem the Chief Justice stated that had to be rectified is the "friction in relations between state and federal courts".

The problem and its remedy is well-stated in the opinion of this Court in the *City of Indianapolis* case, supra. Con-

gress has provided the means for reducing to a large measure this friction by the enactment of Section 1359. It is now up to the Federal Courts to give Section 1359 the meaning intended by the Congress. This the Court below has done as have all of the Courts of Appeals since the *McSparran* decision. No Court of Appeals has rejected the soundness of *McSparran*.

If a Court of Appeals does reject *McSparran* and holds to the construction of Section 1359 which "emasculates" the intent of the Congress — then, it is respectfully submitted, this Honorable Court *will* need to announce a uniform rule for all of the circuits which gives the statute the meaning intended by the Congress. This time has not yet arrived.

This Court denied certiorari in *McSparran* just two weeks after its decision in *Kramer v. Caribbean Mills, Inc.* No new circumstance has arisen in the eight months since that denial of certiorari as to necessitate or warrant a review of the proper construction of Section 1359. No construction of Section 1359 different from that announced in *McSparran* has since been recognized by any Court of Appeals. The holding of the Fifth Circuit herein does nothing more than to adopt the soundness of the opinions of the Second, Third and Fourth Circuits and the rationale of the opinion of this Court in *Kramer*.

III.

There is no evidence of any hardship in requiring Petitioner to bring his case in the State Court which is peculiarly conversant with such local matters.

Petitioner's case is not barred by limitations. Article 5539a, Revised Civil Statutes of Texas. See in this regard, *Burford v. Sun Oil Co.*, 186 S.W. 2d 306, 314-315 (Tex. Civ. App. 1945, *error ref'd. W.M.*) Similarly, Petitioner has not brought forward any evidence of hardship resulting from requiring him to look solely to the State Court. The most Petitioner can offer is his desire for Federal discovery procedures and a broader base of jury selection. Such "reasons" are

> "* * * a blatant example of precisely the type of forum-shopping that section 1359 and cases like Erie R.R. Co. v. Thompkins, 304 U.S. 64, 58 S. Ct. 817, 82 L. Ed. 1188 (1938) were designed to prevent." *O'Brien v. Avco Corporation*, 425 F. 2d 1030, 1036 (2 Cir. 1969)".

No discovery has been made or attempted in this case. Indeed, the same Counsel herein represent the beneficiaries of a second person who was killed in the same accident as was John William Morris. Counsel was content to file that second lawsuit in the State Courts and has made wide use of the discovery techniques available through the Texas Rules of Civil Procedure.

CONCLUSION AND PRAYER

Certiorari should be denied for at least three reasons.

First, the decision of the Fifth Circuit herein is correct. It gives effect to the Congressional intent as expressed in 28 U.S.C. Section 1359. Further, it gives effect to the even

more fundamental principle of federalism by which Federal Courts are to leave such local matters to the State Courts so as to keep themselves free for their overly-burdened docket of distinctively federal business and cases wherein the need for diversity jurisdiction is both real and substantial.

Second, there is no need for this Court to exercise its power of supervision over the circuit courts. The erroneous construction of Section 1359 which emasculated the Congressional intent was a creature of the circuit courts. The circuit courts have now corrected such erroneous interpretation and, since *McSparran*, have unanimously adopted that construction of Section 1359 as gives effect to the intent of the Congress.

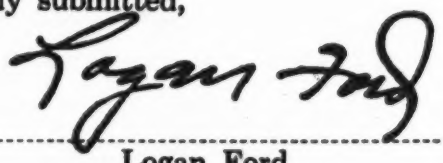
Third, Petitioner has offered no evidence of any hardship by the requirement that he bring his suit in the State Courts. The most Counsel can offer are the repeated admissions that he was forum-shopping and that he procured the appointment of the foreign administrator in an effort to manufacture diversity jurisdiction.

Counsel has admitted that "the motivating purpose for the appointment of the Louisiana administrator was to authorize the bringing and maintenance of the cause in the United States District Court instead of the state district court" (Page 2, Respondent's Response to the Petition for Permission to Appeal filed in Court of Appeals). Counsel has likewise admitted that he would make no issue as to any other considerations for such appointment. If 28 U.S.C. Section 1359 is to be given the meaning intended by Con-

gress (or, indeed, any meaning at all) this case can only be termed a case of manufactured diversity proscribed by that statute.

WHEREFORE, PREMISES CONSIDERED, Respondent prays that the just and correct decision of the Court of Appeals be left unimpaired and that this Honorable Court DENY a writ of certiorari in this case.

Respectfully submitted,



Logan Ford
1511 Fidelity Union Life Bldg.,
Dallas, Texas 75201,
Counsel for Respondent.

Of Counsel:
BURFORD, RYBURN & FORD,
FRANK M. RYBURN, JR.,
WAYNE PEARSON,
J. DAN BOHANNAN,
1511 Fidelity Union Life
Building,
Dallas, Texas 75201.

CERTIFICATE

The undersigned certified that on the 13th day of January, A.D., 1971, he did mail, by first class United States mail, postage prepaid, three copies of the foregoing Respondent's Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to W. James Kronzer, Esq., Counsel for Petitioner.

Logan Ford

APPENDIX OF STATUTES NOT HERETOFORE REPRODUCED IN THIS BRIEF

Article 4675, Revised Civil Statutes of Texas:

"Actions for damages arising from death shall be for the sole and exclusive benefit of and may be brought by the surviving husband, wife, children, and parents of the person whose death has been caused or by either of them for the benefit of all. If none of said parties commence such action within three calendar months after the death of the deceased, the executor or administrator of the deceased shall commence and prosecute the action unless requested by all of such parties not to prosecute the same. The amount recovered shall not be liable for the debts of the deceased."

Article 5539a, Revised Civil Statutes of Texas:

"When an action shall be dismissed in any way, or a judgment therein shall be set aside or annulled in a direct proceeding, because of a want of jurisdiction of the Trial Court in which such action shall have been filed, and within sixty (60) days after such dismissal or other disposition becomes final, such action shall be commenced in a Court of Proper Jurisdiction, the period between the date of first filing and that of commencement in the second Court shall not be counted as a part of the period of limitation unless the opposite party shall in abatement show the first filing to have been in intentional disregard of jurisdiction."

CERTIORARI DENIED

N.C.R.